

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 367 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SOMAJI MANAJI THAKORE

Versus

STATE OF GUJARAT

Appearance:

MR VIVEK BAROT for Petitioner

MR BD DESAI, A.P.P.for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and

MR.JUSTICE M.C.PATEL

Date of decision: 17/12/97

ORAL JUDGEMENT (Per Soni,J.)

The appellant-original accused no.1 in Sessions Case no.3/88 has preferred this appeal against the judgment and order of conviction dated 24th February, 1989 passed by the learned Addl.Sessions Judge, Ahmedabad Rural, imposing imprisonment for life holding him guilty

of offence punishable under Section 302 of the Indian Penal Code.

The facts leading to the prosecution of appellant and other four who are acquitted are as under:

On 22nd September, 1987 there was an announcement of agitation of Rasta Roko by Kisan Sangh in the State of Gujarat. Persons of the Patel community of village Jakora Taluka District Gandhinagar in support of the said agitation, have not gone to their fields. To support that agitation and to obstruct the road by cutting the trees barriers were created. Deceased Motibhai Ishwarbhai Patel, despite this agitation, it appears had gone to the field. Son of Motibhai named Mukesh had gone near bus stand on that day where the cut tree was lying as barrier and one Prabhatji Bhavanji was further cutting down the same. It appears that there was verbal exchange between Mukesh and the said Prabhatji. Mukesh had gone to the house of his uncle Dashratbhai as he was chased by five to seven Thakores for being assaulted. At that time there was a quarrel at about 11.00 p.m. between Patels and Thakores of that village near water tank. In that quarrel Motibhai Ishwarbhai died and others were injured. Complaint was registered before Charoda Crossroad Police with P.S.I. Parmar and offence was registered under Sections 147, 148, 302 and 302 read with Section 149 and also under Sections 324, 323, 325, 326 read with Section 149 of the Indian Penal Code against the accused. Complaint was registered against five persons as accused. All the accused were charged under Sections 147, 148, 323, 324 and 326 read with Section 149 of the Indian Penal Code. The accused no.1 was charged under Section 302 and accused nos.2 to 5 were charged under Section 302 read with section 149 of the Indian Penal Code. As accused pleaded not guilty to the charge, prosecution led necessary evidence to prove the charge and on completion of the evidence by the prosecution further statement of the accused was recorded. It transpires from the further statement of the accused that they have not committed any offence but as accused no.4 who is a postman was prevented by the villagers, wherein deceased and prosecution witnesses were there, from discharging his duties and as they were trying to snatch away his bag and cycle, to rescue the accused no.4, the accused nos.1 to 3 rushed there where scuffle took place and there was stone throwing as a result of which accused nos.1 to 4 are injured. As other persons from the village of the community of the accused came there and as atmosphere became tense, they ran away. Many of the prosecution witnesses are injured by stone throwing. They have not

committed any offence nor have they assaulted anyone, in particular, the deceased Motibhai or any of the prosecution witnesses.

The learned Additional Sessions Judge heard the prosecution as well as defence and held the accused no.1 guilty of offences under Section 302 of the Indian Penal Code and awarded sentence to him as referred hereinabove. The learned Additional sessions Judge was pleased to acquit rest of the accused of all the charges levelled against them. The learned Addl. Sessions Judge also acquitted the accused no.1 of the charges under Sections 147, 148, 149 and other charges levelled in the chargesheet.

Learned Counsel Mr. Barot has challenged this conviction mainly on the ground that prosecution witnesses cannot be relied upon in as much as the medical evidence does not support their say, in particular, about the injuries caused to them at the time of incident and alleged to have been caused by the accused. He also challenged the evidence of the witnesses on the ground that none of them have seen the commission of incident and have simply deposed on their imagination. In the alternative he has contended that in any case, the case of accused no.1 would fall under Section 304 Part II in the facts and circumstances as are on record. It is true that the prosecution witnesses, namely, Dashratbhai Rannchhodbhai P.W.14, Ashokbhai Gopaldas, P.W.11, Rameshbhai Keshavbhai, P.W.13, Pravinbhai Hirabhai, P.W.17, Ambalal Somabhai, P.W.18 and Manubhai Shivabhai, P.W.19 are injured witnesses. By evidence of Dr. R.P.Patel, P.W.1, the prosecution has tried to prove their injuries. All these prosecution witnesses have contused lacerated wound. It is specifically made out from the evidence of this Doctor that the weapons ascribed for these wounds are not such which can cause contused lacerated wounds. Mr. Barot therefore contended that the say of any of these witnesses cannot be relied upon as they are not corroborated by the evidence of Medical Officer, and therefore, their say about their presence at the relevant time cannot be accepted. The learned Additional Sessions Judge has acquitted the accused of the charges for injuries caused to these witnesses. The question is, simply because the evidence of these witnesses PW.13, 14, 17, 18 and 19 if cannot be accepted for the injuries caused to them, whether the case of the prosecution can be thrown out for murder of Motibhai Ishwarbhai by accused. We may refer to at this stage that the defence has not disputed the fact that Motibhai Ishwarbhai has died a homicidal death.

We are, therefore not discussing in detail the death of Motibhai is a homicidal one or not. In our opinion, there is sufficient evidence on record of Kanubhai Ambalal, P.W.8, Dashratbhai Ramabhai P.W.9 and Ambalal Somabhai, P.W.18 to establish the fact that it is the accused who have caused injuries on the person of Motibhai Ishwarbhai who succumbed to the injuries caused by them. Kanubhai Ambalal, P.W.8 has specifically stated as under:

"On 22nd September, 1987 I had gone to my field at about 8 O'Clock in the morning. When I was at the bore in my field Motibhai Ishwarbhai had come. At about 10 O'Clock Motibhai and myself were coming back to our home from the field. We came near Panchayat Office at about 10.30. At this time on the roadside Somaji Manaji(accused no.1) was standing with spear, Khodaji Manaji(accused no.3) was standing with dharia, Pujaji Manaji(accused no.2) was standing with stick, Marsangji Bhavanji(accused no.4) was standing with dhati and Kalaji Ramaji (accused no.5) was standing with bow and arrow. I know them as they belong to my village. The accused present in the dock are the same persons. I was walking behind Motibhai at a distance of about ten paces. Dashratbhai Ramabhai P.W.9 was standing near the Panchayat Office at a distance of about 50 ft. He shouted calling Motibhai and telling him not to go there. At that time all those four persons rushed to Motibhai and surrounded him. Khodaji Manaji caught hold of Motibhai. Somaji Manaji who had spear thrust the same on the right belly portion of Motibhai. Motibhai therefore fell down. Pujaji Manaji at this point of time gave stick blow on the head of Motibhai. Motibhai stood up and tried to run away. he ran two to three steps and again fell down. Marsangji and Kalaji then again started assaulting Motibhai. I went on the rear part of Panchayat Office at that time where I met Dashratbhai who told me that these people have assaulted Arvindbhai ramabhai P.W.16, Dashratbhai ranchhodbhai, P.W.14 and Pravinkumar Hiralal, P.W.17 also." This part of the evidence of Kanubhai Ambalal, P.W.8 is tried to be challenged as not acceptable by the following evidence extracted in the cross examination. Police may not have written the fact in the complaint that Dashratbhai Ramabhai shouted from Panchayat Office calling Motibhai not to go there. Simply because that shout by Dashratbhai calling Motibhai and telling him not to go near accused is not stated in the complaint that by itself does not render the complaint and the say of P.w.8 unreliable. Say of P.W.8 is corroborated by the medical evidence. In P.M. notes at paragraph 17, the following

external injuries are shown:

1. Stab wound over rt. lateral lower chest 7" below
rt. axilla between last 2 ribs. 2.5" length,
1 1/2" breadth, 6" deep. Fat comes out from
wound.
2. Contused lacerated wound over rt. deltoid
irregular margin 1 1/2" x 1/2" x 1/2".
3. Contused lacerated wound over lt. upper arm 3"
above lt. elbow joint 1/2 cm. x 1/2 cm. x 1/2 cm.
4. Contused lacerated wound over frontal region of
skull.
 - a. 1/2" x 1/2" x skin deep.
 - b. 1/4" x 1/4" x skin deep.

Under the caption " Head" following internal
injuries are shown:

- Contused lacerated wound on frontal region of
skull.
- a. 1/2" x 1/2" skull deep.
 - b. 1/4" x 1/4" skull deep.

Under the caption " belly" it is shown stab wound
present.

Abdo cavity full of blood. Mouth closed all
teeth seen. Aesophagus NAD. Stomach shows
semidigested liquid material. Small intestine
shows liquid digested material. Large intestine
shows focal mass with gas present. Liver is
ruptured - Rt. lower lobe. Lateral and lower
margin.

The Doctor Mr. M.V.Patel who performed the
postmortem has deposed and said that injury no.1 can be
caused by spear (article no.12), injury no.4 can be
caused by stick (article no.14) injuries nos.2 and 3 can
be caused by any hard blunt substance. The Doctor has
stated that injury no.1 was sufficient in the ordinary
course of nature to cause death. An attempt is made in
cross examination of Doctor to show that injury no.1 can
be caused by a gupti or a knife which may be double edged
one. From the cross-examination of Doctor possibility of

such injuries by knife or gupti made out but possibility of these injuries by spear as alleged by the prosecution is not ruled out. Therefore, the cross-examination has simply remained academic and does not lead to conclusion that the injury is not caused by spear as alleged by the prosecution witnesses. Injury no.4 can be caused by stick(article no.14). The accused no.1 had a spear with him and injury on deceased cannot be ruled out to have been caused by the accused no.1 at the relevant time as per say of Kanubhai Ambalal Patel, P.W.8.

The evidence of Kanubhai, PW.8, is further corroborated by Dashratbhai Ramabhai P.w.9 who has deposed that at the relevant time when Motibhai was coming towards the village in company of Kanubhai, Motibhai inquired from the accused as to what happened. The accused ran towards Motibhai and caught hold of him. Khodaji Manaji caught motibhai by his ear. Somaji Manaji gave blow with spear which was in his hand on the right side of stomach portion of Motibhai. Motibhai fell down there and when he tried to get up, Pujaji Manaji gave a stick blow on his head and there he fell down again after he walked two to four steps. Evidence of this witness cannot be accepted as the same is contrary to the medical evidence. He has referred to the weapons by which he is injured and injuries caused to him cannot be caused by the alleged weapons as per the medical evidence. Simply because evidence of this witness is not acceptable on such a point does not entitle the Court to reject his evidence if acceptable on other points. Evidence of a witness is required to be rejected in toto if one part of evidence which is not acceptable is not separable from the acceptable evidence. So far as this witness is concerned incident which is referred to by him wherein injuries are caused to him appears to have occurred first as he has escaped from the assault of these accused persons. He has run to Panchayat Office from where he saw the second part of the incident wherein Motibhai was injured and killed. So far as that part of the evidence which refers to the injury and assault of Motibhai cannot be rejected simply because subsequent conduct of the witness in our opinion is a confused one. His conduct cannot be said to be improbable or unbelievable but is simply in our opinion a confused one. Whether the witness has gone to hospital or not? In whose company has he gone? Whether he has gone by kachha road or pucca road? This part of the evidence of this witness is required to be appreciated in view of the tension prevailing in the village at the relevant time. Be it that his statement is recorded after some time but what may cause tension is seen, it may confuse the person and

therefore any of the contradictions tried to be brought out in the evidence must be appreciated in that perspective. In our opinion, they are innocuous and not affecting the main story regarding assault on Motibhai. The evidence of Kanubhai, P.W.8 in our opinion is further corroborated by evidence of Ambalal Somabhai, P.W.18. This witness is a teacher and he commutes to this village Jakora from Rajpur which is at a distance of 2 kms. He has deposed as under:

" On 22nd September, 1987, the school was working.On that day I had gone to my field. I returned from my field at about 10.30. At that time, wife of Somaji Manaji stopped my scooter near big pond of the village. She told me that there is a quarrel inter se and requested me to kindly go and pacify it. She told me that I should kindly go there and she will go to call Sarpanch.....I went to my bore. There I parked my scooter and went towards the village. When I reached near the water tank, I saw five to six Thakores standing under the banyan tree. In the said mob, Somaji Manaji, Khodaji Manaji, Pujaji Manaji, Marsangji Bhavanji and Kalaji Ramaji were there. I felt that they are taking away Somaji. When I ran towards them and reached near I saw that they had caught hold of Motidas Ishwardas. Pujaji Manaji asked, " What are you looking at," assault"? At that time Somaji Manaji pierced the spear on the right side of stomach of Motibhai. Motibhai tried to run away. At that time Pujaji Manaji gave a stick blow on his head and Motibhai fell down. He got up and again tried to run. After taking two steps he again fell down. At that time Khodaji Manaji and Marsangji assaulted him with dhati and dharia. They also assaulted me by pelting stones. Realizing that these persons may also assault me, I ran and jumped into the compound wall of school from where I went to my house. I am injured above right thigh portion. I had gone to Sharda Government Dispensary in the noon. In the cross examination the witness has admitted that in the police statement I have stated: " When I came in the village, I saw a huge mob near banyan tree behind the school and i went towards that side. I had seen the accused in that mob. Their names and the weapons with them were stated to the police, however, Police Inspector told me that it is not necessary and that I may say whatever I want to say in the Court. I also told the police that at the time of incident, Pujaji Manaji has said, " What are you looking at?", but the police had not taken it down. The police also did not write the fact which I told the police that Somaji thrust the spear on the right side of Motibhai and Pujaji Manaji gave a stick blow on his head. It is true

that these are the relevant contradictions by omissions, and therefore, the story advanced by this witness, in our opinion does not support the case of Kanubhai, P.W.8. However, evidence of Kanubhai stands corroborated and supported by the evidence of Dashratbhai. Evidence of other witnesses is not accepted by the learned Judge not only for the assault on Motibhai but also for their own injuries. We therefore do not discuss the same in detail as the learned Sessions Judge had accepted the case. In view of these facts and, in particular, the evidence of P.W.8, independently and also as corroborated by P.W.9, the finding of the learned Judge does not call for any interference at our hands. Learned Counsel Mr. Barot has in the alternative contended that it is only one blow given by the accused no.1, and therefore, the case would fall under Part II of Section 304 of the Indian Penal Code. He has brought to our notice from the evidence of witnesses that at the relevant time the atmosphere in the village was very highly surcharged and there were mobs of Thakores and Patels collected in the village and they were hostile to each other. Fact of mob of each community collected and being hostile to each other and atmosphere being surcharged comes on record, but there is nothing on record to show that they had scuffle with each other. It is not suggested to any of the witnesses that there was a scuffle between the two communities and the injury to the accused no.1 is caused. Apart from this written statement of the accused also does not make out the same. The accused in their written statement under Section 313 of Criminal Procedure Code have stated that they went to rescue the accused no.4 who was being manhandled by Dashratbhai Ranchhodbhai, Rameshbhai Keshavlal, Arvindbhai Ramabhai and other Patels. They rescued the accused no.4 and they have then run away. They have not referred as to how Motibhai came there, was injured there and what were the circumstances under which injury is caused. This apart clause 3 of Section 300 reads as under:

"300. Murder,-Except in the cases hereinafter excepted homicide is murder....."

3rdly,-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,....."

Keeping in mind clause 3rdly, it will be relevant to refer to the injury which has been a fatal one. Injury no.1 in paragraph 17 of P.M. notes Exh.31 reads as under:

1. Stab wound over Rt. lateral lower chest 7" below
Auxilla between last two ribs.

2.5" length.

1/2" breadth.

6" depth.

Fat comes out from wounds."

According to Doctor M.V. Patel, P.W.3, the said stab wound is possible by spear (article no.12) and the same is sufficient in the ordinary course of nature to cause death. As referred earlier, looking to the circumstances under which the said injury in question is caused, was it not intended? If yes, what was intended the? Was it something else? If answer to all these question is no, then in such circumstances, keeping in mind the observations in the case of Virsa Singh Vs. State of Punjab reported in AIR 1958 SC 465, the case of the appellant would squarely fall within the purview of clause 3rdly referred above. This Court (Coram: B.C.Patel & S.M.Soni,,JJ.) speaking through myself(S.M.soni,J.) in the decision dated 13th& 14th March,1991 rendered in the case of RAJENDRA TULSIRAM DHOBI VS.STATE OF GUJARAT (Criminal Appeal no.786 of 1985) while relying on Virsa Sing's case has held as under:

" The question therefore remains is whether it falls in clause third as contended by the learned Additional Public Prosecutor.

To attract this provision the prosecution must establish (1) that the accused inflicted injury on the body of the deceased (2) that the intention of the accused was to inflict the very injury which is found on the person of the deceased (3) that the injury was of a particular nature i.e. its place, penetration and depth in the vital organs which have been cut if any and (4) that the injury was sufficiently serious to cause death in the ordinary course of nature. The question is, in view of this requirement to attract clause 3 of Sec.300 of Indian Penal Codee, does prosecution establish that the accused intended to cause the very injury which is caused to the deceased?. In our opinion the word very injury means, the one which is caused was intended, and not that some other injury was intended and what is found is caused. In our opinion, the prosecution is required to establish that a bodily injury is present, secondly, the nature of the injury must be proved and thirdly, it must be proved that there was an intention to inflict

that particular bodily injury, that is that injury caused on the person at a particular site was not an accidental or unintentional. It was not that injury was intended somewhere else and one present is caused. In our opinion, once the injury is found, the intention to cause that injury will be presumed unless the circumstances warrant an opposite conclusion. In the instant case, there is nothing on record to show that the accused intended to inflict injury other than one found. Evidence on record does not warrant that injury was aimed or intended somewhere else but landed on the chest."

"It is therefore clear from this Virsa Singh's case that the prosecution is required to establish that the accused inflicted injury on the person of the deceased (2) that the intention of the accused was to inflict the very injury which has been actually found on the person of the deceased and very injury means that a particular injury inflicted on the person was not accidental or intentional or that some other kind of injury was intended. Also there will be no circumstance to justify inference that a superficial injury was intended or the victim came running and dashed with the weapon used by the accused and an accidental injury thereby was caused."

In view of this fact, we do not agree with the contention of learned Counsel Mr. Barot that the case of the accused will fall under Part II of Section 304 of the Indian Penal Code.

In the result, the appeal fails and is dismissed.

sf-sms